No. 21313

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PAINTERS DISTRICT COUNCIL NO. 36, AFL-CIO, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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No. 21343

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PAINTERS DISTRICT COUNCIL NO. 36, AFL-CIO, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board to enforce its order issued against Painters District Council No. 36, AFL-CIO (hereinafter the Council) on November 17, 1965, following proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).[1] The

[1] Pertinent provisions of the Act are set forth, *infra* pp. 24-25.

Board's decision and order (R. 31)[2] are reported at 155 NLRB No. 92. This Court has jurisdiction over the proceedings under Section 10(e) of the Act, since the unfair labor practices occurred in Los Angeles, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that respondent Council coerced and restrained Commercial Drywall Constructors, Inc. (Commercial) in the selection of its collective bargaining representative, in violation of Section 8(b)(1)(B) of the Act, by forcing Commercial to bargain through a Contractors Association which maintained a pre-existing agreement with the Council and by forcing Commercial to submit grievances to the Joint Committee which administered that contract. The Board further found that the Council refused to bargain in good faith with Commercial, in violation of Section 8(b)(3) of the Act, by insisting as a price of agreement, that Commercial accept a contract requiring the posting of a performance bond and the contribution of money to an industry promotion fund. The facts on which the Board predicated its findings are as follows:

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[2] References to the pleadings and decision and order of the Board, the Trial Examiner's recommended decision and order and other papers reproduced as Volume 1, pleadings, are designed "R." References to portions of the stenographic transcript reproduced pursuant to the Rules of this Court are designated "Tr." "G.C. Ex." refers to the General Counsel's

A. *Background*

Prior to the events in this case, the Council maintained a collective bargaining contract with an employers' group called the Painting and Decorating Contractors Association of Los Angeles County (Contractors Association). The contract provided, *inter alia*, for area and county Joint Committees consisting of representatives of the Association and the Council to administer the agreement, to resolve grievances and to impose monetary fines and penalties (R. 19-20; G.C. Ex. 16, pp. 20, 21, 24). In addition to wages, hours, and conditions of employment, the agreement required employers to (1) carry a "Responsibility Bond" in the amount of $1000 to guarantee payment of wages, fringes, and monetary obligations imposed by the Joint Committee; and (2) to make set contributions to the Administrative Fund Trustees, who had sole discretion to use these sums to defray the cost of administering the agreement.[3]

Exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] The contract provided:

ARTICLE 1

EMPLOYERS

* * * *

Section 2. LICENSE, BONDING AND LEGAL REQUIREMENTS. Every Employer signatory shall have a duly issued and effective California State Contractors License where required by law to perform the work covered by this Agreement, shall carry Responsibility Bonds (see page 59), Workmen's Compensation Insur-

(Footnote continued on following page)

[3] (Continued)

ance and shall comply with all Federal, State and Municipal Laws pertaining to the work covered by this Agreement.

* * * *

ARTICLE 8

ADMINISTRATION

Section 2. CONTRIBUTORS: Every member signatory to this Agreement shall pay to the Administrative Fund Trustees for the purposes set forth below the following sums for every hour worked by every journeymen and apprentices employed under this Agreement. (a) Between July 1, 1964 and December 31, 1964 2¢ per hour; (b) Between January 1, 1965 and June 30, 1965 3¢ per hour and (c) Between July 1, 1965 and June 30, 1969 4¢ per hour.

* * * *

Section 4. EXPENDITURES:

A. The Administrative Fund Trustees shall determine, within their sole discretion, how the said contributions shall be expended to defray the cost of administering this Agreement, to maintain maximum employment and good workmanship in the industry, to foster cooperative relationships between architects, engineers, builders and contracting agencies on the one hand and painting and decorating contractors on the other, and to perpetuate the harmonious relations that have existed between management and labor in the painting and decorating industry; provided, however, that no portion of said contributions shall be paid to any representative of a labor organization as prohibited by the Labor-Management Relations Act.

* * * *

(Footnote continued on following page)

[3] (Continued)

ARTICLE 16

MANNER OF PAYMENT OF WAGES

Section 7. RESPONSIBILITY BOND:

Each contractor signatory to said Agreement shall, by September 1, 1964, post with the Los Angeles County Painters and Decorators Joint Committee, Inc., cash or other security acceptable to the Joint Committee or a surety bond, in the amount of $1000.00 to guarantee any deficiency of such employer in the payment of wages, health and welfare and other fringe benefits and/or any other monetary obligations that are duly imposed under the provisions of this Agreement.

Each employee, Trust Fund or other person or entity having a claim against any contractor under the provisions of this Agreement shall notify the Los Angeles County Painters and Decorators Joint Committee, Inc., in writing, of the facts and circumstances of such unpaid obligation. The Joint Committee, or its representative, shall, after verification of the indebtedness, process a certification of default to the surety company for payment under the terms of the surety bond and remit the funds received from the surety company to the person, fund or entity entitled thereto.

In the event, the employer has deposited cash or other security under these provisions, the Joint Committee, or its representative, shall, after verification of the indebtedness, withdraw from said cash deposit or convert said security to cash and forward to the obligee thereof, sufficient funds to discharge such obligation. Within 24 hours after notice to any employer of such payment by the Joint Committee out of that employer's cash or other security deposit, the employer shall replenish his cash or security deposit to the original sum of $1000.00 or to such further sum as the Joint Committee shall determine as necessary to guarantee future deficiences of such employer.

(Footnote continued on following page)

Just before the events at issue here, the Council and the Contractors Association had been negotiating a new contract, mainly to revise the wages, hours, working conditions and fringe benefits that had existed previously. Although negotiations were concluded, the new agreement had not yet been printed.

B. ***Respondent Council demands under threat of economic sanctions that Commercial sign the contract concluded with the Contractors Association; the contract requires posting of a performance bond and contributions to an industry promotion fund and acceptance of the Contractors Association as bargaining representative for Commercial.***

Commercial is a subcontractor in the building and construction industry engaged in the installation of metal studs and the hanging and taping of drywall (R. 17; Tr. 21-22). In the summer of 1964, Commercial contracted to install wallboard in construction work located at Van Nuys, California, within the Council's jurisdiction (Tr. 29). Commercial began work on that project on June 1 (Tr. 23). On July 1, 1964, Commercial's secretary, Frank A. Calhoun, learned that a man from a Council affiliated Painters' local was at the site talking to the tapers (Tr. 23). Fearing lest the Council impede his workmen at the construction site, Calhoun arranged to dis-

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[3] (Continued)

Should the Los Angeles County Joint Committee determine that the liability of any employer under this agreement is greater than the sum of $1000.00, they may immediately demand and cause the employer to increase his cash deposit or surety bond to an amount sufficient to cover any such liability.

cuss matters with the Council which, concededly, was the bargaining representative of Commercial's employees (R. 18, n. 2; Tr. 29). A meeting took place on July 1 at the Council's office. Those present were Calhoun, Commercial's president William Knorr, the Council's executive secretary Tom Prophet, and his associate Walter Zagajeski. At the outset, Prophet stated that in order for Commercial to perform work in the Los Angeles area it must sign an agreement with the Council (R. 18; Tr. 29). Prophet then handed Calhoun an "Application for Shop Card Of The Los Angeles County Painters and Decorators Joint Committee" (R. 18; G.C. Exh. 2; Tr. 29-30). The card required the signatory employer to agree to a contract between the Council and the Contractors Association, and any amendments, modifications or interpretations of that contract (G.C. Exh. 2).

Calhoun protested. He asked to see the agreement to which the shop card referred. Prophet, explaining that negotiations had just ended but that the agreement was not yet printed, showed Calhoun a mimeographed sheet listing the wages and fringe benefits Commercial would be required to pay. Calhoun agreed to these cost items, but did not agree to sign the card (R. 18; Tr. 31-33).

Subsequently, Calhoun obtained a proof copy of the new agreement at the offices of the Joint Committee (R. 20; Tr. 35). In addition to the provisions of the agreement referred to above, the Agreement provided that it could be amended by the Joint Committee, subject to approval of a majority of the members of the Association and the Council (G.C. Exh. 11, p. 21),

that the Agreement would be administered by the Joint Committee, the Association, and the Council (*id.* at p. 24), and that chapters affiliated with the Painting and Decorating Contractors of America and of California "shall be the sole representative . . . for the purposes of establishing the wages, hours and terms of this agreement." *Id.* at 4.

On July 1, Calhoun telephoned Zagajeski. Calhoun reiterated his willingness to abide by the working conditions and pay the wages and fringe benefits set out in the contract. But he balked at the performance bond requirement, at the industry promotion fund fee, and at Commercial's representation by the Contractors Association. Prophet told him, however, "We cannot change any part of this agreement. You will have to sign the same thing everyone else does" (Tr. 35). Calhoun replied that what Commercial wanted was a contract with the Council, not a contract with the Joint Committee (R. 18; Tr. 30). At this point, Prophet produced a mimeographed paper showing the wages and fringe benefits newly negotiated with the Contractors Association (R. 18; Tr. 32). Calhoun did not object to these items. He expressed willingness to sign a contract based upon the negotiated figures (R. 18; Tr. 33). But this solution did not meet with the Council's approval and the session adjourned.

On July 2, 1964, Calhoun contacted Zagajeski at the Council by telephone. He reiterated Commercial's willingness to adopt the wages, hours, working conditions and fringe benefits under the new Contractors

Asociation contract (R. 20; Tr. 36). But he stated that Commercial would not agree to be represented by the Contractors Association, to post a performance bond, to contribute to the industry promotion fund, or to submit to the disposition of grievances by the Joint Committee (R. 20; Tr. 36). Zagajeski was adamant. The Council, he said, would not sign an agreement with Commercial and as far as he was concerned, Commercial would have to deal with the Joint Committee (R. 20; Tr. 36).

On July 5, 1964, Calhoun consulted an attorney who subsequently wrote a letter to Council on Commercial's behalf (G.C. Exh. 4) agreeing to the wages, hours, and other terms and conditions of employment set out in the Los Angeles Painters and Decorators Joint Committee agreement. But Commercial's attorney insisted that Commercial would not accept the Painting and Decorating Contracting Association as its collective bargaining and grievance adjustment representative. The letter also objected to the contract's requirement that a responsibility bond be posted by the signatory contractor (*ibid.*).

Responding to Commercial's letter, Council wrote a letter on August 4 (G.C. Exh. No. 7) stating Council's readiness to execute an agreement "covering the wages, hours, and all of the terms and conditions of employment in accord with the existing bargaining agreements which are uniform with respect to all employers." The letter continued, "There are reasons for the responsibility bond, and I am sure that you will agree with us, and the reasons for the interlock-

ing obligations with other Unions, which have been long standing in the history of labor, and which are problem items of not only negotiations and bargaining, but of contract. Some of these are mandatory subjects of bargaining; one or two may be non-mandatory. Nevertheless, we believe that in an atmosphere of sincerity, on both parts, we can conclude our Agreement between us, and incorporate these items so that we have uniformity for your benefit and for the benefit of all" (G.C. Exh. 6).

Another meeting of the principals on August 11 ended without agreement. Zagajeski proposed a few changes, none of which met Commercial's major objections (G.C. Exh. No. 9). Calhoun inquired whether, if Commercial agreed to the changes, the Council would sign. Zagajeski refused (Tr. 46). There then ensued an interchange of correspondence, and on October 23 the parties met again.

The meeting was prompted by a telephone call which Commercial President Knorr received from the Hight Construction Company, where Commercial had undertaken a new job (Tr. 48). Hight told Commercial to get its union problems straightened out or its contract would be cancelled (Tr. 48).[4] Knorr immediately arranged a meeting with the Council. Present at the meeting were Zagajeski, Knorr and Cal-

[4] Calhoun also learned from his foreman on the job that the Union business agent had stopped by and stated that "there would be no more tapers allowed to work there on that job since Hight Construction Company was signatory to an AGC agreement, and that there wouldn't be any workers referred to that job until a contract was signed" (Tr. 71).

houn (Tr. 48). Calhoun inquired of Zagajeski at the outset, "Well, what could we do to get the job going?" (Tr. 48). Zagajeski responded, "Well, all you got to do is sign this agreement" (R. 21; 48, 101). Calhoun objected. He stated that no prudent business man would sign such an agreement; that the payments required were violative of the antitrust laws and of the Extortion Act (Tr. 49, 50). Zagajeski replied, "there will be no men on that job unless an agreement is signed" (R. 21; Tr. 50). Calhoun walked out (Tr. 100). Zagajeski then repeated to President Knorr his assertion that the only way to put men back on the job and keep Hight out of trouble was to sign the application for a shop card (Tr. 101). Knorr subsequently signed the agreement, paid the shop card fee, and posted the bond (Tr. 101).

II. The Board's Conclusions and Order

On the basis of the foregoing facts, the Board concluded that the performance bond and the contribution of money to an industry promotion fund were not mandatory subjects of bargaining and that respondent Council's insistence on the inclusion of these provisions as the price for agreement violated Section 8(b)(3) of the Act (R. 22, 24). The Board further found that by coercing Commercial to accept the Contractors Association as its collective bargaining representative and to use the Joint Committee for the resolution of grievances, the Council violated Section 8(b)(1)(B) of the Act (R. 23, 24). The Board's order requires the Council to cease and desist from the

unfair labor practices found and from enforcing the performance bond and industry promotion fund contribution provisions of the existing contract with Commercial or from renewing that contract or resolving grievances under it except where Commercial, through its own representatives, agreed to such action (R. 24). Affirmatively, the Board's order requires the Council to notify Commercial in writing that it will not insist upon contract provisions that are not mandatory subjects of bargaining, to reimburse Commercial for expenses incurred in connection with the performance bond and the industry promotion fund contributions, and to post appropriate notices (R. 24).

ARGUMENT

I. The Board Properly Found That Respondent Restrained and Coerced Commercial In Its Choice of Bargaining Representative, In Violation of Section 8(b)(1)(B) of the Act

Section 8(b)(1)(B) of the Act states that it is an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining". By insisting, despite Commercial's vehement and reiterated objections, (Tr. 29, 30, 36), that if Commercial was to perform work in the Los Angeles Area, it must accept the Contractors Association as its bargaining and grievance representative and use the Joint Committee machinery for the resolution of grievances, the Council violated the Act. *Metropolitan District Council of Philadelphia Carpenters*, 137

NLRB 1583; *Local 2, Operative Plasterers and Cement Masons*, 149 NLRB 1264, petition for enforcement filed, December 2, 1965 (Civ. No. 20583 (C.A. 9)). Cf. *N.L.R.B.* v. *Local 294, Teamsters*, 284 F. 2d 887 (C.A. 2); *ITU Local 38* v. *N.L.R.B.*, 278 F. 6, 11-12 (C.A. 1), affirmed in relevant part by an equally divided court, 365 U.S. 705.[5]

It is clear that the Council threatened work stoppages to compel Commercial to accept the Association as its bargaining representative. Council's Executive Secretary Tom Prophet announced at the outset that Commercial could not perform work in the Los Angeles Area unless it signed the contract (Tr. 29, 35) and that only by signing the contract could Commercial put men back on the Hight Construction Company job (Tr. 49-50, 101). Prophet refused to deviate from his refusal to sign an agreement with Commercial alone although he testified at the hearing that the Council had on occasion negotiated individually with other employers (Tr. 217-218). Council demanded that Commercial sign the contract if it wanted to proceed with its work at the construction site. "There will be no men on that job," stated Prophet, "unless an agreement is signed" (Tr. 50).[6]

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[5] The Joint Committee consisted of an equal number of representatives of the Council and of the Association (G.C. Ex. 11, p. 22).

[6] Contrary to evidence adduced by the General Counsel, respondent contends it did not invoke economic sanctions to induce Commercial to sign the contract. The Trial Examiner, however, credited the testimony of Commercial's witnesses. This Court is bound by his finding. Credibility of witnesses

Since, as shown in the Statement, *supra*, pp. 8-11, one of the principal stumbling blocks to agreement was Council's refusal to sign an agreement with Commercial alone, Council's insistence that Commercial agree to representation by the Association violated Section 8(b)(1)(B) of the Act.

II. Respondent Violated Section 8(b)(3) of the Act by Insisting as the Price of Agreement, That Commercial Sign a Contract Requiring It to Post a Performance Bond and to Make Contributions to an Industry Promotion Fund

Agreement between Council and Commercial foundered not only upon Council's insistence that Commercial accept an unwanted bargaining agent, but also upon Council's rejection of Commercial's offer to accept the wages, hours, and working conditions set forth in the agreement because Commercial would not agree to post a performance bond or to contribute to the industry promotion fund set up in the agreement. Council's insistence upon these two provisions prevented consummation of an agreement fixing working conditions and therefore constituted a violation of Section 8(b)(3) of the Act.

The law is well settled that neither an employer nor a Union in the course of collective bargaining can condition willingness to negotiate or contract about working conditions upon the other party's acceding to demands which do not relate to wages, hours, and

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and reasonable inferences to be drawn from the evidence are matters for determination by the Board. *N.L.R.B.* v. *IBEW, Local 340 (Walsh Construction Co.)*, 301 F. 2d 824, 827-828 (C.A. 9).

other terms and conditions of employment. As the Supreme Court stated in *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349;

> "Read together, these provisions [Section 8(a)(5) and 8(d)] establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment.' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. *Labor Board* v. *American National Insurance Co.*, 343 U.S. 395. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.
>
> The Company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining."

As shown in the Statement of Facts, Commercial repeatedly offered to adopt the wage, hours, and fringe benefits already incorporated in the Association Contract, see pp. 7-8, *supra*, but refused to agree to the performance bond and industry promotion fund clauses of the contract. Commercial capitulated only under threat of economic sanction. Consequently, if a performance bond clause and an industry pro-

motion fund clause are outside the scope of the bargaining obligation established by Section 8(d) of the Act and therefore constitute non-mandatory subjects of bargaining about which neither party may require the other to yield, the Board's order should be enforced. See *International Longshoremen's Assn.* v. *N.L.R.B.*, 277 F. 2d 681, 683 (C.A. D.C.).[7] We show below that both these matters are non-mandatory subjects of bargaining.

A. *The performance bond clause was not a mandatory subject of bargaining*

It has consistently been held by the Board and the courts that a union violates Section 8(b)(3) of the Act by insisting that, as a condition precedent to executing a collective bargaining agreement, the employer agree to post a bond or its equivalent to afford the union or the employees security against possible defaults. *Carpenters District Council of Detroit* v. *N.L.R.B.*, 58 LRRM 2064 (C.A.D.C.), enforcing 145 NLRB 663; *Local 164, Brotherhood of Painters* v. *N.L.R.B.*, 293 F. 2d 133 (C.A.D.C.), cert. denied, 368 U.S. 824; *International Brotherhood of Teamsters (Conway's Express)*, 87 NLRB 972, 978-979, aff'd on other grounds *sub nom. Rabouin* v. *N.L.R.B.*, 195 F. 2d 906 (C.A. 2); *International Hod Carriers, Building and Common Laborers, Local 1082*, 150 NLRB 158, petition for enforcement filed, February 25, 1966, (Civ. No. 20775 (C.A. 9); *Local 2, Operative*

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[7] "The right of the union to urge a non-mandatory subject of bargaining ceases short of ultimate insistence." *Ibid.*

Plasterers and Cement Masons, 149 NLRB 1264, petition for enforcement filed December 2, 1965, Civ. No. 20583 (C.A. 9). Similarly, an employer's insistence upon a performance bond or like guarantee on the part of the union has been held violative of Section 8(a)(5). *N.L.R.B.* v. *American Compress Warehouse*, 321 F. 2d 547 (C.A. 5), cert. denied, 375 U.S. 968; *N.L.R.B.* v. *Davison*, 318 F. 2d 550 (C.A. 4); *N.L.R.B.* v. *F. M. Reeves & Sons, Inc.*, 47 LRRM 2480 (C.A. 10), cert. denied, 366 U.S. 914; *N.L.R.B.* v. *Taormina*, 207 F. 2d 251 (C.A. 5); *N.L.R.B.* v. *Dalton Telephone Co.*, 187 F. 2d 811 (C.A. 5), cert. denied, 342 U.S. 824; *N.L.R.B.* v. *Tower Hosiery Mills, Inc.*, 180 F. 2d 701 (C.A. 4), cert. denied, 340 U.S. 811.

The plain language of the statute itself establishes that performance bonds are beyond the scope of mandatory collective bargaining. Section 8(d) requires bargaining with respect to "terms and conditions of employment," not guarantees running to one party in the event the other commits a breach of contract. Such guarantees bear only an attenuated relation to the "actual performance of work" (*Local 164, Brotherhood of Painters* v. *N.L.R.B.*, *supra*, 293 F. 2d at 135). That "Congress has provided a remedy to be available in the event of a breach of contract" itself indicates that performance bonds have been excluded from the area of mandatory collective bargaining. *Local 164, United Brotherhood of Painters* v. *N.L.R.B.*, *supra*.

Further, insistence upon a performance bond impedes effective collective bargaining because it tends to interfere with the ripening of otherwise effective collective bargaining into a final agreement. As the Board held in *Conway's Express, supra,* (87 NLRB at 978-979):

> "The question is whether this demand for a bond was consistent with the Union's obligation to bargain under Section 8(b)(3). We think it was not. The Board, as early at 1940, held in the *Blackburn* case [21 NLRB 1240] that by demanding that a union post a performance bond, an employer sought to prefix the fulfillment of its statutory obligation with a condition not within the provisions, and manifestly inconsistent with the policy of the Act, and therefore violated Section 8(a)(5) of the Act. We believe that the same rule should apply in the converse situation, where the demand for a performance bond is made by a union rather than by an employer. * * * It is true that the Union's insistence upon a bond, in the circumstances of this case, was not wholly unreasonable and that it was not, so far as the record shows, designed to frustrate the settlement of the strike. However, the Union's good faith in advancing this proposal is not decisive of the issue. It is the *tendency* of such proposals to 'delay or impede or otherwise circumscribe the bargaining process,' which renders them improper."

Particularly, the Board has expressed concern that permitting unions or employers to insist upon performance guarantees would create an obstacle to agreement which only a financially able party could

successfully avoid. Unless a party undertook to prove its financial inability to provide appropriate contract guarantees and the Board undertook to pass upon the sufficiency of this evidence, a collective bargaining agreement would in fact be beyond its reach unless it could somehow provide the necessary security.

In short, the tendency unquestionably would be to restrict effective collective bargaining to financially secure parties, in clear derogation of national labor policy. An objective of the statute is to eliminate obstructions to the free flow of commerce by encouraging collective bargaining concerning "terms and conditions of employment." Section 1 of the Act. Since the flow of commerce can be disrupted as readily by a dispute involving a relatively impecunious employer or labor union as by a dispute involving large, well established organizations, the statutory requirement that parties negotiate in good faith toward collective bargaining agreements cannot be limited to prosperous employers and unions, or denied to those which cannot provide substantial surety or guarantee of their undertakings.

For the above reasons, the Board has consistently adhered to its position that performance bonds and their equivalent are not mandatory subjects of collective bargaining, and that the language "wages, hours, and other terms and conditions of employment" cannot properly be construed to encompass performance guarantees demanded as a precondition to entering into a collective bargaining contract. This is so even if the performance guarantee in question can be read

as securing only employee benefits within the scope of Section 8(d). See *Carpenters District Council of Detroit (Excello Dry Wall Co.)*, 145 NLRB 663, enf'd 58 LRRM 2064 (C.A.D.C.) (per curiam). There, the union conditioned agreement upon the establishment of a fund, to be placed in escrow, as security for the payment of wages and fringe benefits. The Board, with court approval, found that such a provision was not a subject of mandatory bargaining. For insistence upon that fund erected precisely the same obstacle to effective bargaining as insistence upon the posting of a broader performance bond payable upon any breach of the collective bargaining agreement. In each case, the implementation of the agreement is conditioned by the union upon a preliminary performance on the part of the employer. In neither is the performance requested properly a "term or condition of employment." Rather, it is a condition precedent to employment, a form of sanction in the event of breach of contract, and has little if anything to do "with the actual performance of work or to subsequent relations" (*Local 164, Painters* v. *N.L.R.B.*, *supra*, 293 F. 2d at 135).

In sum, the Board's holding here that the Council's bond proposal is not a mandatory subject of collective bargaining accords not only with sound labor policy, but with prior decisions of the Board and the courts. The Council's insistence on the inclusion of such a clause, and its coercion of Commercial into signing a contract containing one, clearly is violative of Section 8(b)(3).

B. *A proposal that an employer contribute to an industry promotion fund is not a mandatory subject of bargaining*

Like insistence upon a performance bond, insistence that an employer or a union contribute to an industry promotion fund is also an unfair labor practice. *N.L.R.B.* v. *Detroit Resilient Floor Decorators Local*, 317 F. 2d 269 (C.A. 6). As the Sixth Circuit said in the cited case: "To hold, however, under this Act that one party must bargain at the behest of another on any matter that might conceivably enhance the prospects of the industry would transform bargaining over the compensation, hours, and employment conditions of employees into a debate of policy objectives . . ." "The question of participation in an industry promotion fund is not a mandatory subject of bargaining because it is neither wages, hours, nor a term or condition of employment." 317 F. 2d at 270, quoting *Detroit Resilient Floor Decorators Local*, 136 NLRB 769, 771. Accord *Local 2, Operative Plasterers and Cement Masons (Arnold Hansen)*, 149 NLRB 1264, petition for enforcement filed December 2, 1965 (Civ. No. 20583, C.A. 9). Thus, the industry promotion fund is outside the employment relationship. It concerns itself rather with the relationship of employers to one another or, like advertising, with the relationship of an employer to the consuming public. Just as in *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, the "strike vote clause" there in issue was held not to be a mandatory subject of bargaining because it dealt only with relations between employees and their union, as distinct from a

"no strike" clause, which regulates the relations between the employer and the employees, 356 U.S. at 350, so here the industry promotion fund deals neither with wages, hours, or conditions of employment, nor with the employer-employee relationship. Accordingly, the Council's insistence that Commercial sign a contract requiring it to make contributions to an industry promotion fund, coupled with Council's threat of a work stoppage to compel Commercial to sign the agreement, violated the union's obligation to bargain in good faith. See *N.L.R.B.* v. *Detroit Resilient Floor Decorators, Local, supra; Metropolitan District Council of Philadelphia, Carpenters*, 137 NLRB 1583; *Operative Plasterers and Cement Masons, supra; Local 80, Sheet Metal Workers*, 161 NLRB No. 7, decided October 21, 1966, 63 LRRM 1261 and cases cited therein.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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National Labor Relations Board.

December 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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Assistant General Counsel
National Labor Relations Board

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; * * *
>
> * * * *
>
> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the

proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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